Supreme Court, U.S.
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In The

Supreme Court of the United States

CLINTON W. FINSTAD,

Petitioner,

vs.

BOARD OF PROFESSIONAL SURVEYORS & MAPPERS/ STATE OF FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is it a violation of Petitioner's constitutional rights for Respondents:

a. to direct its licensees as to what exculpatory and explanatory notes, if any (and their specific wording), **cannot** (emphasis added) be placed on their professional work product, e.g., NOT FOR CONSTRUCTION (explicit denial of free speech);

b. to punish its licensees for using notes, e.g., FENCES MEANDER ON AND OFF LINE (implicit denial of free speech)?

(That is, without a law prior to the placement of notes expressly forbidding the exact notes not to be used on their product (i.e., due process)).

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING A WRIT OF CERTIORARI	7
1. Show why the decisions of lower courts may be erroneous	7
2. The national importance of having the Supreme Court decide the question involved	14
3. Show whether the decision of the court that decided your case is in conflict with the decisions of another appellate court	17
4. State the importance of the case not only to Petitioner but to others similarly situated	21
5. State the ways the decisions of the lower courts in Petitioner's case were erroneous	23
6. Relief Sought: Declaratory Relief and Injunctive Relief	29
CONCLUSION	31

TABLE OF CONTENTS – Continued

Page

APPENDIX

Opinion and Decision of the United States Court of Appeals ..... App. 1

Opinion and Decision of the United States District Court ..... App. 5

Probable Cause Panel Meeting October 2, 2008 ... App. 11

Probable Cause Panel Meeting April 8, 2008 ..... App. 29

TABLE OF AUTHORITIES

Page

CASES

Baird v. State Bar of Arizona, 491 U.S. 1 (1971).....15

Baran v. Port of Beaumont Navigation District Jefferson County, 57 F.3d 436 (5th Cir. 1995).....13

Beazell v. Ohio, 269 U.S. 167 (1925).....30

Bell v. Jones, 523 A.2d 982 (D.C. App. 1986).....5, 15

Berger v. United States, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921).....28

Bradley v. School Board of City of Richmond, Virginia, 324 F.Supp. 439 (E.D. Va. 1971).....12

Camero v. United States, 375 F.2d 777 (Ct. Cl. 1967).....11

Central Hudson Gas & Electric v. Public Service Comm'n of N.Y., 447 U.S. 557 (1980).....26

Collins v. Dixie Transport, Inc., 543 So. 2d 160 (Miss. 1989).....28

Crain v. United States, 162 U.S. 625, 16 S.Ct. 952, 40 L.Ed. 1097 (1896).....10

Davis v. Board of School Comm'rs of Mobile County, 517 F.2d 1044 (5th Cir. 1975), cert. denied, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976).....14

Edenfield v. Fane, 507 U.S. 761 (1993).....27

Firefighters Local No. 1784 v. Stotts, 467 U.S. 561 (1984).....20

TABLE OF AUTHORITIES – Continued

Page

Florida Board of Business Regulation, Department of Business Regulation, Division of Pari-Mutuel Wagering v. National Labor Relations Board, et al., 605 F.2d 916 (5th Cir. 1979) 20

Foley v. Morris, 339 So. 2d 215 (Fla. 1976) 22

Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) 20

Harris v. Battle, 348 U.S. 803 (1960) 9

Heberle v. P.R.O. Liquidating Company, 186 So. 2d 280 (Fla. 1966) 22

Higginbotham v. State, 88 Fla. 26, 101 So. 233 (1924) 30

Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy, 621 So. 2d 435 (Fla. Dist. Ct. App. 1993) 26, 27

Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy, 512 U.S. 136 (1994) 26, 27

ITT Rayonier Incorporated v. United States of America, et al., 651 F.2d 343 (5th Cir. 1981) 20

Knapp v. Kinsey, 232 F.2d 458 (6th Cir. 1956), rehearing denied, 235 F.2d 129, cert. denied, 352 U.S. 892, 77 S.Ct. 131, 1 L.Ed.2d 86 (1956) 13

Larson v. Independent Life & Accident Ins. Co., 29 So. 2d 448 (Fla. 1947) 23

TABLE OF AUTHORITIES – Continued

Page

Liljeberg v. Health Services Acq. Corp., 486 U.S. 847 (1988).....14, 32

Liteky v. U.S., 510 U.S. 540 (1994).....14

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).....7, 16, 21, 29, 31

Oil Workers Union v. Missouri, 361 U.S. 363 (1960).....9

Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976).....20

Peel v. Attorney Registration and Disciplinary Comm'n of Ill., 496 U.S. 91 (1990).....16

Public Utilities Comm'n of D.C. v. Pollack, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068 (1952).....32

Seven Barrels of Wine, 83 So. 627 (Fla. 1920) 22

Sosna v. Iowa, 419 U.S. 393, 95 S.Ct. 553 (1975) 20

State v. Lowry, 230 A.2d 907 (N.J. 1967).....22

Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 94 S.Ct. 1694, 40 L.Ed.2d 1 (1974).....8, 19

The New Orleans Steamship Association v. Plaquemines Port Harbor and Terminal District, 816 F.2d 1074 (5th Cir. 1987).....20

Trinity Episcopal Corp. v. Romney, 387 F.Supp. 1044 (D.C.N.Y. 1974).....25

Trustees of Tufts College v. Triple R Ranch, Inc., 275 So. 2d 521 (Fla. 1973) 22

U.S. v. Smith, 249 F.Supp. 515 (D.C. Iowa 1966) 25

TABLE OF AUTHORITIES – Continued

Page

Union Carbide Corp. v. U.S. Cutting Service, Inc., 782 F.2d 710 (7th Cir. 1986) 27

United States v. Townsend, 151 F.Supp. 378 (D.C.D.C. 1957) 10

Valley et al. v. Rapides Parish School Board, 118 F.3d 1047 (5th Cir. 1997).....12, 13

Vaughn v. State, 3 Tenn.Criminal.App. 54, 456 S.W.2d 879 (1970).....25

Wienstein v. Bradford, 423 U.S. 147 (1975).....20

Wilenski v. Fields, 267 So. 2d 1 (Fla. 1972).....30

Yamaha Parts Distribution Inc. v. Ehrman, 316 So. 2d 557 (Fla. 1975) 22

Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985).....26

STATUTES AND RULES

Title 28, United States Code, § 144 13

Title 28, United States Code, § 455(a).....9, 14, 31

Title 28, United States Code, § 455(b)(5)(i) 9

Title 28 United States Code § 1254(1).....1

Title 28 United States Code § 1651(a).....1, 27, 29, 30

Title 28 United States Code § 2106 30

Florida Statute Chapter 455 4

Florida Statute Chapter 472 4

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

70 C.J.S. Penal, p. 386 22

Black's Law Dictionary, Sixth Edition, 1990 25

Fifth Amendment to the United States Constitution ..... *passim*

First Amendment to the United States Constitution 2, 5

Florida Administrative Code (F.A.C.) Chapter 61G17 4

Florida Administrative Code (F.A.C.) Chapter 61G17-6.0031(1)(a) 3

Fourteenth Amendment to the United States Constitution ..... *passim*

Fourth Amendment to the United States Constitution 2, 6, 21

Melville, Herman, "*BILLY BUDD*" (1924) 32

State of Florida Constitution, Article I, Section 10 3

United States Constitution, Article 1, Section 9(3) 3

United States Constitution, Article 1, Section 10(1) 3

Wolfram, Modern Legal Ethics 17.5.5 Independence and Neutrality, p. 989 (1986) 28

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari be issued to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts**: The opinion of the United States Court of Appeals appears at Appendix 1 to the petition and

[x] is unpublished.

The opinion of the United States district court appears at Appendix 5 to the petition and

[x] is unpublished.

JURISDICTION

[x] For cases from **federal courts**: The date on which the United States Court of Appeals issued their mandate on October 3, 2008.

[x] An extension of time to file the petition for a writ of certiorari was granted to and including March 2, 2009 on December 19, 2008 in Application No. 08A539.

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1) and pursuant to the jurisdiction conferred by Title 28 U.S.C. § 1651(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the United States Constitution in pertinent part provides:

> " . . . Congress shall make no law abridging the freedom of speech, or of the press."

Fourth Amendment to the United States Constitution in pertinent part provides:

> " . . . The right of the people to be secure in their persons, papers, and effects, against unreasonable searches and seizures . . . "

Fifth Amendment to the United States Constitution in pertinent part provides:

> " . . . No person shall be subject for the same offense to be twice put in jeopardy. . . . No person shall be deprived of life, liberty, or property, without due process of law."

Fourteenth Amendment Section 1 to the United States Constitution in pertinent part provides:

> " . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . "

Ex Post Facto Law:

United States Constitution, Article 1, Section 9(3) in pertinent part states:

> " . . . No Bill of Attainder or ex post facto Law shall be passed."

United States Constitution, Article 1, Section 10(1) in pertinent part states:

> " . . . No state shall pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . "

State of Florida Constitution, Article 1, Section 10 in pertinent part states:

> "No Bill of Attainder, ex post facto Law or Law impairing the obligation of contracts shall be passed."

61G17-6.0031(1)(a), Florida Administrative Code which states:

> "The public must have the confidence that boundaries of real property are located on the ground in the adequate and defensible manner. In meeting this objective, surveyors and mappers must meet the minimum standards of accuracy, completeness and quality."

STATEMENT OF THE CASE

Petitioner received his Florida Professional Land Surveyor's license #2453, issued by Florida State Board of Professional Engineers and Land Surveyors in 1975, which remains in good standing.

Petitioner's experience is: construction, civil and environmental engineering, construction surveying, land surveying, forensic surveying and GPS. Petitioner earned his Master of Science in Civil Engineering in 2003 and earned his Engineer Intern Certification in 2003. Petitioner has been in business in Florida since 1988 providing land surveying services in Florida to numerous clients throughout the world.

Respondents are the state agencies charged with regulating the practice of land surveying and mapping pursuant to Chapters 455 and 472, Florida Statutes and Chapter 61G17, Florida Administrative Code.

Petitioner contends there are two types of notes that remain at issue. The first type (i.e., explicit denial of free speech), the Petitioner, and those similarly situated, cannot use exact wording (e.g., NOT FOR CONSTRUCTION) which is disciplined through an unwritten law, and the other type (implicit denial of free speech) may be used, again, in their opinion rather than a written law, however, pain from the Respondents will follow. See Complaint, Case No. 2005-029854, August 26, 2006, (hereinafter "Complaint"). This is contrary to the directions written in

the suggested minimum standards, which the standards themselves require a higher standard be applied if needed (e.g., FENCES MEANDER ON AND OFF LINE).

On July 14, 2005 Respondents filed complaints (explicit and implicit denial of free speech) against both Mary Finstad as well as her corporation, Finstad Land & Spatial Surveying Corp. on the survey in question. Neither she, nor her corporation prepared, signed or issued the subject survey. (Complaint #2005-028318 and #2005-036884).

Respondents then accused Petitioner, and a complaint was issued by Respondents against Petitioner (explicit and implicit denial of free speech) (Complaint), in which its Probable Cause Panel presided. In the complaint, Case No. 2005-029854 filed on August 26, 2006, Petitioner was charged (explicit and implicit denial of free speech) with circumventing and contravening the law by placing exculpatory and explanatory notes on the survey.

Petitioner contended that, in his professional opinion, necessary and as required by Bell v. Jones, 523 A.2d 982 (D.C. App. 1986) that these notes be placed on the face of his surveys to protect and inform the public. Respondents' decision to deny the explicit denial notes (e.g., NOT FOR CONSTRUCTION) and the implicit denial notes (e.g., FENCES MEANDER ON AND OFF LINE) are incompatible with rights guaranteed within First Amendment to the United States Constitution restraints on official action. Also,

Petitioner contends the Respondents' actions to obtain records from him and those similarly situated are incompatible with the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. (App. 11-28).

Petitioner filed a lawsuit in District Federal Court and the Respondents suggested to the Court that the Respondents will drop all intent to harm Petitioner. That Court dismissed the case as Moot and that the District Court has no means to issue an Order for a Declaratory Statement or Injunctive Relief. The Appellate Court AFFIRMED.

Respondents immediately attacked Petitioner in public and at Respondents' subsequent hearings. (Refiled cases against his corporation and licensed surveyors. Public abuse.) (App. 11, 29).

The case becomes a simple one. *Petitioner asserts*: Number one, the Respondents refuse to let the Petitioner, and those similarly situated, use notes of their choosing without threatening punishment on the Petitioner, his corporation and those similarly situated (e.g., FENCES MEANDER ON AND OFF LINE (showing dimensions to the fence would be misleading in the licensee's opinion)). This is being done ex post facto (Probable Cause Panel Meeting, July 10, 2007, (hereinafter "Panel"); Complaint). Secondly, Respondents are evading review and is continuing to attack the Petitioner and those similarly situated. Also, the Petitioner and those similarly situated are being placed in penal, possibly criminal

situations (App. 11, 29; Panel; Complaint) without the appropriate civil rights (e.g., *Miranda*). Much damage has been done and it will continue.

Petitioner has standing and the case is not moot, as he directs and/or supervises as to what notes (in question) will and will not appear on the surveys. The additional complaints filed (at time of District Court ruling) were on his notes at his direction (e.g., FENCES MEANDER ON AND OFF LINE). If the Petitioner uses notes of his choosing, the Respondents will destroy his company and others.

Respondents assert: this case is over (Moot) and will not come up again.

We now come before this honorable Court.

REASONS FOR GRANTING A WRIT OF CERTIORARI

1. Show why the decisions of lower courts may be erroneous.

Petitioner filed a complaint in Federal District Court, Case No. 2:06-CV-644-FtM-29-SPC filed on December 14, 2006 requesting Declaratory Statement and Injunctive Relief. Instead of being provided due process (i.e., the opportunity to submit evidence through discovery, dispositions, etc.) Respondents withdrew their administrative complaint (to evade review, Panel, L-21) against Petitioner. Respondents replaced their complaint with a complaint against Petitioner's

corporation: F.L.A. Surveys Corp. and Petitioner's licensed surveyors (Panel). Petitioner was denied due process (App. 11-28), and the lower court erred in prematurely dismissing the Petitioner's complaint based on hearsay (suggestions from Respondents' counsel, ex parte and/or extrajudicial representation(s) (App. 5-10). The District Court had the broad discretionary power to review all the evidence knowing the impact that either a negative or premature ruling would have on society.

Further, this occurred in a case where one of the matters in dispute appears to be resolved and hence, the Petitioner would not be entitled to judicial intervention unless the issue is a recurring one and likely to be raised again between the parties. Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 94 S.Ct. 1694, 40 L.Ed.2d 1 (1974). The Court held that:

> "To the extent that declaratory relief was sought, the case-or-controversy requirement of Art III, 2, and the Declaratory Judgment Act is completely satisfied. Pp. 121-122.
>
> (a) Even though the case for an injunction dissolved with the settlement . . . the petitioners . . . may still retain sufficient interests and injury to justify declaratory relief. Pp. 121-122.
>
> (b) The challenged governmental action is not contingent upon executive discretion and has not ceased, but is a fixed and definite policy which, by its continuing presence, casts what may well be a substantial

> adverse effect upon the petitioners' interest. Oil Workers Union v. Missouri, 361 U.S. 363 (1960), Harris v. Battle . . . distinguished. Pp. 122-125.
>
> (c) . . . this case most certainly would be of the type presenting an issue 'capable of repetition, yet evading review,' Southern Pac. Terminal Co. v. ICC."

Respondents' attempt and willingness to evade review is found in,

" . . . that would literally remove the basis for the federal lawsuit . . . ?" See Panel, L-21.

Petitioner further respectfully moves this Court, pursuant to the provisions of Title 28 U.S.C. § 455 to direct the Honorable Judge Steele to vacate his judgment in the case designated as Case No. 2:06-cv-644-FtM-29SPC and disqualify himself from further adjudication of that case. Vacation of judgment and recusal is justified on the grounds that the Judge was disqualified under Title 28 U.S.C. §§ 455(a) and 455(b)(5)(i) at the time he ruled and entered judgment in favor of Respondents since they willfully denied entrance of important evidence (the denial of use of the note, FENCES MEANDER ON AND OFF LINE) by following the narrow path premeditatedly designed by Respondents to mislead Judge Steele through hearsay and innuendos and that this concealment of evidence obstructed justice and abridged Petitioner's due process under the Fifth and Fourteenth Amendments, thus prevented Petitioner from

receiving a valid review in Appellate Court, which court was unaware of the concealment of evidence in the court below and its reliance on the presumptive fact that government decisions are always correct and in the best interest of society.

Petitioner invokes his Fifth Amendment protection, along with the other guarantees contained within the Bill of Rights, which, when applied to the federal courts, serves to act as the basic protection of the citizens against unjust federal action. Crain v. United States, 162 U.S. 625, 16 S.Ct. 952, 40 L.Ed. 1097 (1896).

Therefore, it is Crain Court's view that the Fifth Amendment due process must carry an even broader interpretation than the Fourteenth Amendment due process protection. United States v. Townsend, 151 F.Supp. 378 (D.C.D.C. 1957), at 387.

Petitioner further prays that the subject case be reassigned to a judge who is not inclined to so expeditiously dispose of his/her cases by eliminating the opportunity for these cases to be tried on the merits in a manner that will promote public confidence in the integrity and fairness of the federal judicial system and provide to the litigants the blessing of equal justice under the law.

At a critical juncture in Petitioner's lawsuit against the State of Florida, involving summary judgment, Judge Steele articulated his opinion by a

ruling that favored Respondents after " . . . representation made by the prosecuting attorney (Respondents' attorney) that the current regulatory regime permits the use of 'explanatory notes'" (App. 6), shows that Judge Steele relied, ex parte, upon knowledge acquired outside of the proceedings and displayed an unequivocal partiality that rendered fair judgment impossible. (App. 5-10).

The duties of Judge Steele bring him into professional and possibly social contact with the State Attorney General's Office and other attorneys employed by the State of Florida. Thus, there is no barrier to private or non-judicial association with these officers of the court. Judge Steele's contacts with Respondents show his receipt of extrajudicial information that may include rumor and innuendos about Petitioner. Judge Steele has admitted to receiving ex parte "representations" (App. 9) from Respondents' counsel to which Petitioner was not privy or allowed the opportunity to respond.

"It is difficult to imagine a more serious incursion on fairness than to permit the representatives of one of the parties to privately communicate his recommendations to the decision makers." Camero v. United States, 375 F.2d 777 (Ct. Cl. 1967), at 781.

> "The basic requirement of constitutional due process is a fair and impartial tribunal, whether at the hands of a court, an administrative agency or a governmental hearing officer. The Supreme Court has consistently enforced this basic procedural right and held

> that decision-makers are constitutionally unacceptable in the following circumstances [including] . . . **where an adjudicator has been the target of personal abuse or criticism from the party before him**. . . ." (emphasis added) Valley, et al. v. Rapides Parish School Board, 118 F.3d 1047 (5th Cir. 1997).

Judge Steele's condescending assessment of Petitioner's standing was subjective and prejudicial. More importantly, his statement that Petitioner is no longer in danger of prosecution by Respondents have been proven to be incorrect. Judge Steele's statement that " . . . there is no possibility of future harm under the current regulatory regime" shows his unbounded trust in Respondents that he formed an opinion in this matter months before any scheduled trial and before commencement of discovery or the taking of a single deposition.

"Adjudicative decisions . . . should be free of bias or prejudice. Thus, an adjudicative decision maker should be disqualified if he or she has prejudged disputed adjudicative issues." Valley, et al. v. Rapides Parish School Board, 118 F.3d 1047 (5th Cir. 1997), at 1053. Moreover, "Prejudgment as to the facts . . . or reason to believe such exists, if fairly supported, would, in the Court's view satisfy Section 144." Bradley v. School Board of City of Richmond, Virginia, 324 F.Supp. 439 (E.D. Va. 1971), at 445.

The basic requirement of constitutional due process is a fair and impartial tribunal, and the

Supreme Court has consistently enforced this basic procedural right.

The problem of a procedural defect arises when a decision-maker has prejudged the facts to such an extent that their minds are 'irrevocably closed' before actual adjudication. Valley at 1052, citing Baran v. Port of Beaumont Navigation District Jefferson County, 57 F.3d 436 (5th Cir. 1995), at 446.

> "Bias or prejudice on the part of a judge may exhibit itself prior to the actual trial by acts or statements on his part. **If it is known to exist before the trial, before discovery, before depositions, it furnishes the basis for disqualification of the judge to conduct the trial**," (emphasis added). Title 28 U.S.C. § 144. Knapp v. Kinsey, 232 F.2d 458 (6th Cir. 1956), at 465, rehearing denied, 235 F.2d 129, cert. denied, 352 U.S. 892, 77 S.Ct. 131, 1 L.Ed.2d 86 (1956).

In the present case, Judge Steele's predisposition and bent of mind, as revealed in his actions and writings, satisfy the requirement for disqualification.

Justice Scalia, joined by Justices Rehnquist, O'Connor, Thomas, and Ginsburg, expressed in Liteky the majority Court opinion that:

> "A favorable or unfavorable predisposition can also deserve to be characterized as 'bias' or 'prejudice' requiring recusal because, even though it springs from the facts adduced or the events . . . it is so extreme as to display clear inability to render fair judgment. (That

> explains what some courts have called the 'pervasive bias exception' to the extrajudicial source doctrine." See Davis v. Board of School Comm'rs of Mobile County, 517 F.2d 1044, 1051 (5th Cir. 1975), cert. denied, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976).) Liteky v. U.S., 510 U.S. 540 (1994), at 551.
>
> " . . . [Opinions arise during the course of judicial proceedings require disqualification under Title 28 U.S.C. § 455(a) only if they 'display a deep seated favoritism or antagonism that would make fair judgment impossible.'] That standard is not a fair interpretation of the statute, and is quite insufficient to serve and protect the integrity of the courts." Liteky v. U.S., 510 U.S. 540 (1994), at 563.

Title 28 U.S.C. § 455(a) . . . guarantee(s) not only a partisan judge will not sit, but also that no reasonable person would have suspicion. See Liljeberg v. Health Services Acq. Corp., 486 U.S. 847, 860 (1988). Liteky, id. at 567.

2. The national importance of having the Supreme Court decide the question involved.

In absence of due process (i.e., passage of laws and rules in advance of disciplinary action) granting governmental administrative authority to restrict the placement of exculpatory and explanatory notes (commercial speech) by licensees of any profession will present an ever growing danger harming the public through the deprivation of critical information

obtained by licensee through their ethics, education, experience and skills.

Respondents' allegation that Petitioner is a repeat offender through his direction of corporate policy is without merit. Until the filing in Federal District Court, Petitioner never formally contested Respondents' jurisdiction and any 'belief' regarding the reach of the Respondents' authority is not sanctionable. Baird v. State Bar of Arizona, 491 U.S. 1, 6 (1971). Further, it is not acceptable to allow Respondents to simply charge or insinuate any unwillingness of Petitioner to comply with their regulations; they must build their own case based on specific evidence of non-compliance through due process. As long as Petitioner holds his surveying and mapping license in good standing it is very difficult, if not impossible, to stretch the imagination to embrace the theory of misleading the average person or being deceitful through the placement of exculpatory and explanatory on Petitioner's surveys as required by Bell v. Jones, 523 A.2d 982 (D.C. App. 1986) to educate and make the public aware of the existing conditions that may otherwise go unobserved or rectified.

Respondents' justification for disciplining Petitioner based on his usage of exculpatory and explanatory notes is not persuasive. Respondents provided no evidence that such notes stating: NOT FOR CONSTRUCTION or FENCES MEANDER ON AND OFF LINE was " . . . inherently false, misleading or deceitful to the general public interpretation of the same."

same." See Peel v. Attorney Registration and Disciplinary Comm'n of Ill., 496 U.S. 91 (1990). The key issue here appears to be the state of knowledge of the public that receives the exculpatory and explanatory notes is the incorrect presumption that such notes would be false, misleading or deceitful does not provide persuasive evidence that restrictions the Respondents want to place on Petitioner's license outweighs Petitioner's constitutionally protected speech or penal prosecution (falsely accused of fraud, Complaint) without due process.

It is absolutely necessary for this Court to state clearly to the public and licensees: Licensees have *Miranda* rights and those rights will be upheld by this Court, licensees have the right to place exculpatory and explanatory notes of their choosing on their work products and not be held hostage by the Boards because of those notes (implicit), and if these notes are not false, misleading, and deceitful, the licensee may extend the communication to the public through his work product (explicit).

It is clear that State Boards do not want any accountability (Panel). If this Court does not give a clear signal on this, then licensees will retreat, seeking shelter **AND** be silenced, **AND** seek no accountability. The public expects the licensee to be forth right, open, and accountable. If this Court does not protect the licensees' rights, how can it hold them accountable?

3. Show whether the decision of the court that decided your case is in conflict with the decisions of another appellate court.

Petitioner appealed timely, but the Eleventh Circuit, in an unpublished opinion, affirmed the District Court for substantially the same reasons on October 3, 2008. Had all of the evidence been on record, the Appellate Court would have ruled differently; however, the Appellate Court ruled incompatibly with other appellate courts and wrongfully denied the submittal of additional evidence (App. 29-36, April 8, 2008 hearing) that demonstrated Respondents' actions to willfully harass and prosecute Petitioner through his corporation at later meetings (App. 11-28; App. 29-36). The Appellate Court's action is incompatible with the protections contained within the Fifth and Fourteenth Amendment. Petitioner's corporation is his alter ego and remains one and the same with Petitioner as the corporate signatory for his corporation; therefore, Petitioner is accountable for the corporation's use of survey notes. The Appellate Court further denied Petitioner's motion for an extension of time for a rehearing on November 17, 2008 which would have allowed Petitioner the opportunity to file subsequent evidence addressing the repeatability intent of Respondents in App. 11-28, October 2, 2008 hearing. Subsequently, Petitioner's Application No. 08A539 to the United States Supreme Court was granted an extension of time until March 2, 2009 to prepare this Writ of Certiorari.

Respondents' on-going delay tactics in providing copies of its Probable Cause Panel Hearing of April 8, 2008 minutes (App. 29-36) has deprived Petitioner the opportunity for timely evidentiary submittal to the Federal District Court and the Appellate Court. The District Court expeditiously removed this case from their plate by relying on the fraudulent appearance created by Respondents to eliminate their personal cause of action against Petitioner and cleverly replaced those accusations against Petitioner's corporation within days of the District Court's decision. Thus, emphasizing the urgency of Declaratory and Injunctive Relief as requested in Petitioner's original complaint. Petitioner complained that the newly created, deceptive and untruthful statements by Respondents in dropping the personal complaint against Petitioner were employed before the Appellate Court. When these deceptive and newly created legal maneuverings were pointed out in Petitioner's brief the Appellate Court declined the rehearing and reaffirmed their Mandate. Petitioner remains the activator requiring his alter ego to place notes on the work product.

Subsequent to the District Court dismissal, Respondents' Panel Hearing on April 8, 2008 and then again on October 2, 2008 (App. 11-28; App. 29-36) resulted in derogatory innuendos toward Petitioner's policies and his corporation's policy on the placement of exculpatory and explanatory notes. This hearing resulted in disciplinary action taken by Respondents against Petitioner (App. 11-28). Thus,

there remains a continuing need for Petitioner to seek Injunctive Relief from the court. Super Tire, id.

After the dismissal of the District Court, one of the Probable Cause Panel members commented in its April 8, 2008 hearing demonstrates this: "What good is a survey . . . (with exculpatory and explanatory notes: "Not For Construction" on your surveys). What value does it have?" These comments remain as an implied threat of possible retaliation through suspension or revocation of Petitioner's license: "I know it is part of NTS (sic) or whatever." (App. 33). The District Court's Order granted on November 14, 2007, (App. 9-10) noted in part that: " . . . there is no possibility of future injury under the current regulatory regime as 'explanatory notes' have been found to be permissible. Therefore, the entry of an injunction is not warranted." To date, there has been no action by Respondents implemented either administratively or legislatively to correct this matter. However, Respondents have and continue to issue a number of disciplinary complaints addressing this very issue and/or this same case: Case Numbers: 2005-028318, 2005-036884, 2005-038748, 2005-037384, 2005-037365, 2005-056049, 2005-056129.

This Appellate Court's decision differs from others on the issue of "capable of repetition and evading review" portion of Super Tire, id., is the case followed by the Supreme Court and the Appellate Courts. The Corporation and licensees use the notes that the Corporate Surveyor (Petitioner) and licensees decide. In this case it is improper to drop

Petitioner to intentionally and premeditatedly evade review and attack other surveyors for the same notes that Respondents supposedly approved. In fact, they have not (App. 11-28; App. 29-36; Panel; Complaint). This Appellate Court is in conflict with other rulings: Sosna v. Iowa, 419 U.S. at 399-400, 95 S.Ct. at 557 (1975); Florida Board of Business Regulation, Department of Business Regulation, Division of Pari-Mutuel Wagering v. National Labor Relations Board, et al., 605 F.2d 916 (5th Cir. 1979); Pasadena City Board of Education v. Spangler, 427 U.S. 424, 440 (1976); U.S. Court of Appeals for the 5th Cir. – the New Orleans Steamship Association, Plaintiff-Appellant, v. Plaquemines Port Harbor and Terminal District, Defendant-Appellee. No. 87-3068 Summary Calendar., 816 F.2d 1074 (5th Cir. 1987); U.S. Court of Appeals for the 5th Cir. – ITT Rayonier Incorporated, Plaintiff-Appellant, v. United States of America, et al., Defendants-Appellees, 651 F.2d 343 (5th Cir. 1981); Wienstein v. Bradford, 423 U.S. 147 (1975); Franks v. Bowman Transportation Co., 424 U.S. 747, 755-757 (1976); Firefighters Local No. 1784 v. Stotts, 467 U.S. 561 (1984).

Further, the Appellate Court erred in their conclusion based on existing rule(s) (App. 3-4) that addressed the usage of exculpatory and explanatory notes and allowing them to be placed on licensees' work product. In fact, there is no written law which is well established through Respondents' counsel. (Panel).

Further, the Appellate Court erred (App. 4) when stating in part: " . . . there is nothing in the records" when the request to submit additional evidence was denied. (App. 1-4; App. 29-36).

4. State the importance of the case not only to the Petitioner but to others similarly situated.

Respondents persist in using the unlimited power and resources of the State of Florida to illegally prosecute the licensees that they regulate, by disciplining those licensees for alleged violations of unwritten rules and laws, and obtaining records without *Miranda* rights.

Petitioner now falls victim to Respondents' legal maneuverings by Respondents dropping the charges against him personally and transferring them to his alter ego corporation as a device to side step judicial proceedings, while continuing to "ask" (the modern practice of interrogation and persecution) him personally, in public, about his notes (NOT FOR CONSTRUCTION, etc.).

Petitioner's due process and equal protection rights under the Fourth, Fifth and Fourteenth Amendments were and continue to be severely abridged in the Probable Cause Panel Hearings with him concerning his corporation and his practice of using exculpatory and explanatory notes (App. 11-28; App. 29-36; Panel; Complaint).

Referring to 70 C.J.S. Penal, p. 386, stated in part: " . . . The word 'penal' is one of the most elastic known to the law, and has many different shades of meaning." See State v. Lowry, 230 A.2d 907, 913 (N.J. 1967) where the court emphasized that a criminal law is always a penal law, but that the converse need not necessarily be true . . . stated in part: "'Penal' is inherently a much broader term than 'criminal,' since it pertains to any punishment or penalty and relates to acts which are not necessarily delineated as criminal."

However, even if Respondents wished to claim that these were not ex post facto prohibitions reference is made to the rule of statutory construction that statutes (other than curative or remedial measures) are presumed to operate only prospectively from the effective date. The Florida Supreme Court in Trustees of Tufts College v. Triple R Ranch, Inc., 275 So. 2d 521, 524 (Fla. 1973), stated in part: " . . . A statute will be construed as prospective only unless the intention of the Legislature to give it a retroactive effect is expressed in language too clear and explicit to admit to reasonable doubt."

Further endorsing: Foley v. Morris, 339 So. 2d 215 (Fla. 1976); Yamaha Parts Distribution Inc. v. Ehrman, 316 So. 2d 557 (Fla. 1975); Seven Barrels of Wine, 83 So. 627 (Fla. 1920). In Heberle v. P.R.O. Liquidating Company, 186 So. 2d 280, 282 (Fla. 1966), it stated in part: " . . . A law is retroactive or retrospective if it takes away or impairs vested rights acquired under existing laws, **or if it creates a new obligation, imposes a new duty, or attaches a new**

disability in respect to transactions or considerations already past." (emphasis added).

See Larson v. Independent Life & Accident Ins. Co., 29 So. 2d 448 (Fla. 1947) where the retroactive application was applied in a very strict manner was stated in part: " . . . [a]cts which create new obligations and impose new penalties, have been more rigidly construed as being governed by this rule."

Those similarly situated have been abandoned (App. 11-28; App. 29-36; Panel; Complaint), as the Respondents will not review and correct the records or make them whole without this honorable Court.

5. State the ways the decisions of the lower courts in Petitioner's case were erroneous.

At every critical junction, the Federal Court's reasoning appeared to be guided along a very narrow path through misleading innuendo's and suggestions: " . . . this court may consider facts outside the pleadings such as testimony . . . " (App. 5-10), that has led to Respondents' goal of denying Petitioner a trial on the merits of his case. In some instances, this process involved accepting alleged "undisputed facts" that have been sharply disputed by documentary evidence together with Petitioner's sworn testimony. Amplifying the continuous supply of misleading directions led to an example of the District Court's error, was its treatment of Petitioner's request for both Declaratory Statement and Injunctive Relief as Respondents continued to threaten strong disciplinary action

against Petitioner (i.e., probation or revocation of a professional's license) for non-compliance with the removal of certain exculpatory and explanatory notes on Petitioner's surveys. Documentation which thoroughly substantiated Petitioner's stance was not allowed into evidence by the Court's refusal to allow due process to evolve through the discovery process. Petitioner, a professional land surveyor and mapper untrained in law, was astonished that the Court abandoned objective reasoning to favor a presumption: government employees are always correct in their decision-making roles. Petitioner can cite numerous instances of this bias and lack of objectivity, but a full accounting is beyond this petition. These complaints and judgments notwithstanding the evidence suggest the existence of influence from an extrajudicial source and lead Petitioner to search for other links beyond the presumption of facts between Respondents, the District Court and the Appellate Court.

Respondents have the authority to provide direction for their licensees through administrative and judicial procedures set forth in statute and rule. Respondents' own counsel pointed out to Respondents, " . . . that you really don't have a minimum technical standard rule that says thou shalt not use disclaimers." (Panel). If Respondents feel compelled to change the law, then proper steps need to be followed: pass a state law, pass professional guidelines or administrative rules according to those laws; publish and distribute written continuing education

courses, journals, articles, etc. outlining the proposed laws, in order to provide sufficient time, education, training and materials for implementation and to allow licensees the opportunity to formally challenge any inappropriate rule or law through due process. See Trinity Episcopal Corp. v. Romney, 387 F.Supp. 1044, 1084 (D.C.N.Y. 1974).

"The concept of 'due process of law' as it is embodied in Fifth Amendment demands that a law shall not be unreasonable, arbitrary, or capricious and that the means selected shall have a reasonable and substantial relation to the object being sought." U.S. v. Smith, 249 F.Supp. 515, 516 (D.C. Iowa 1966). Black's Law Dictionary, Sixth Edition, 1990.

> "In the event, a professional disagrees with the law, rule or regulation; they have an opportunity to contest it through the proper administrative or judicial forum.
>
> Fundamental requisite of 'due process' is the opportunity to be heard, to be aware that a matter is pending, to make an informed choice whether to acquiesce or contest, and to assert before the appropriate decision-making body the reasons for such a choice." Trinity Episcopal Corp. v. Romney, 387 F.Supp. 1044, 1084 (D.C.N.Y. 1974). Black's Law Dictionary, Sixth Edition, 1990.
>
> "Aside from all else, 'due process' means fundamental fairness and substantial justice." Vaughn v. State, 3 Tenn.Criminal.App. 54, 456 S.W.2d 879, 883 (1970).

If any question of fact or liability be conclusively presumed against Petitioner without the above fundamental requisites, this is not due process. The lower court erred in their misplaced trust with Respondents' counsel through "representations made by the prosecuting attorney" (actually Respondents') that the current regulatory regime will permit notes. (App. 9-10). This reliance on hear say is not due process. And, it is a falsehood.

If Respondents decide to discipline in absence of a law: "Thou shalt not use any exculpatory and explanatory notes on the professional's signed, sealed documents" (Panel) and move ex post facto to prosecute for infractions on Petitioner's past documents, this is not due process.

Petitioner's and those similarly situated use of exculpatory and explanatory notes and abbreviations qualifies as "commercial speech." As stated in Ibanez v. Florida Department of Business & Professional Regulation, Board of Accountancy, 621 So. 2d 435 (Fla. Dist. Ct. App. 1993) and 512 U.S. 136 (1994), the State of Florida " . . . may ban 'speech' only if it is false, deceptive or misleading. See also Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 638 (1985). If it is not false, deceptive or misleading, Respondents can only restrict exculpatory and explanatory notes by showing that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest. (E.g., Central Hudson Gas & Electric v. Public Service Comm'n of N.Y., 447 U.S. 557, 564, 566 (1980)).

The State's burden is not slight: "It must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." See Edenfield v. Fane, 507 U.S. 761 (1993). As in Ibenez v. Florida Department of Business and Professional Regulation, Board of Accountancy, 621 So. 2d 435 (Fla. Dist. Ct. App. 1993) and 512 U.S. 136 (1994), measured against these standards, the order dismissing Petitioner cannot stand.

Alternatively, it is well settled that a certiorari petition is the proper procedure for an appellate court by which to review a district court judge for disqualification from a case in which his or her impartiality might reasonably be questioned as granted in Title 28 U.S.C. § 1651(a).

> "A judge's refusal to recuse himself in the face of a substantial challenge casts a shadow not only over the individual litigation but over the integrity of the federal judicial process as a whole. The shadow should be dispelled at the earliest possible opportunity by an authoritative judgment either upholding or rejecting the challenge. In recognition of this point we have been liberal in allowing the use of the extraordinary writ of certiorari to review orders denying motions to disqualify."

Union Carbide Corp. v. U.S. Cutting Service, Inc., 782 F.2d 710 (7th Cir. 1986), at 712. Although a Writ of Certiorari may be opposed on the premise that it should not be used as a substitute for appeal, Petitioner contends that no party should be required to

submit to a presiding judge who has a prejudicial bent of mind, expecting that there will be another opportunity for justice after final judgment has been rendered. Rather, certiorari viewed must be as a means of avoiding a needless and judicially inefficient ordeal.

"Due process . . . [requires] that a judge who is otherwise qualified to preside at trial or other proceedings must be sufficiently neutral and free of disposition to be able to render a fair decision. **No person should be required to stand trial before a judge with a 'bent of mind,'** (emphasis added) Collins v. Dixie Transport, Inc., 543 So. 2d 160 (Miss. 1989), at 166, citing Berger v. United States, 255 U.S. 22, 33, 41 S.Ct. 230, 233, 65 L.Ed 481 (1921); Wolfram, Modern Legal Ethics 17.5.5 Independence and Neutrality, p. 989 (1986)."

The Supreme Court has ruled that the right of Declaratory Judgment and Injunctive Relief should be granted if the illegal actions could be or would be continuing. (App. 11-28; App. 29-36). Also, the Court has upheld that Moot would be questioned if it is merely an attempt to evade review. (App. 34, 35, 36; Panel). Petitioner did not have due process, therefore, did not have the opportunity to persuade the District Court that such was the case.

The District Court erred by trusting the Respondents completely and without allowing the Petitioner to show his side (due process). In this case, do not give him (Petitioner) a trial at all and lynch the family (we will lynch him later).

6. Relief Sought: Declaratory Relief and Injunctive Relief.

Pursuant to the authority granted in Title 28 U.S.C. § 1651(a), Petitioner respectfully moves this court to grant this Writ of Certiorari directing Respondents to review their decisions for the past ten years and appropriately and monetarily compensate to make whole their licensees that were victimized by all actions and activities performed in absence of due process. (e.g., *Miranda*) (App. 12-28).

The veiled interrogation process of Respondents started with an aberration of innocence through a telephone call to Petitioner's office . . . one of dozens handled daily by the administration. Then, sliding into a fishing expedition with a non-licensed person, requested clarification and/or information on an older survey while posturing his position representing Respondents. This illustration of and as stated in Miranda v. Arizona, 384 U.S. 436, 444, 478, 479, 86 S.Ct. 1602, 1612, 1630, 16 L.Ed.2d 694 (1966), id. " . . . the modern practice of in-custody interrogation is psychologically rather than physically oriented" and that " . . . The blood of the accused is not the only hallmark of an unconstitutional inquisition." Petitioner's administrator felt she was surrounded by six thugs each standing ten feet tall, weighing four hundred pounds and donned with a seven and a half foot Samurai sword (intimidated). When Petitioner returns to the office from the field, he is told: We received a call from Tallahassee and they want you to call back (it's bad). The internal seizure experienced

by Petitioner was best described by Herman Melville in his novel, Billy Budd: the innocent man is incapable of speech. However, the Petitioner, unlike Billy, seeks justice through due process.

In Wilenski v. Fields, 267 So. 2d 1, 5 (Fla. 1972), the ex post facto prohibition stated in part: " . . . An ex post facto law is 'one which, in its operation, makes that criminal which was not so at the time the action was performed, or which increases the punishment, or, in short, which in relation to the offense or its consequences alters the situation of a party to his disadvantage." Higginbotham v. State, 88 Fla. 26, 101 So. 233 (1924). This merely endorses the United States Supreme Court's definition as stated in part: " . . . any statute which punishes as a crime an act previously committed, which was innocent when done, **which makes more burdensome the punishment for a crime, after its commission**, (emphasis added), or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as **ex post facto**." Beazell v. Ohio, 269 U.S. 167, 169 (1925).

Alternatively, Petitioner, plaintiff in Case No. 2:06-cv-644-FtM-29SPC, respectfully moves this Court, pursuant to the provisions of Title 28 U.S.C. § 1651(a), also to order the Honorable Steele of the United States District Court to vacate his order denying Petitioner's Motion for Declaratory Statement and Injunctive Relief pursuant to Title 28 U.S.C. § 2106, since Respondents have displayed a

blatant disrespect for both the District Court and the Appellate Court in their continuation of its "kangaroo court activity." This order must be issued because the District Court indisputably abused its broad discretion when public safety was the matter at issue and Petitioner has failed to obtain relief in the Eleventh Circuit through the appellate process.

CONCLUSION

To maintain the integrity of the federal judicial system, the Court must be concerned whether the parties receive fair and impartial treatment of their claims. At the risk of shaking the public's confidence in the judicial system, the bedrock of fairness principle and the welfare of the parties must receive priority over other considerations should the absence of providing Petitioner his *Miranda* rights, the prohibition of ex post facto and/or a violation of Title 28 U.S.C. § 455(a) be in place. In this matter currently under review, justice requires review of Petitioner's First Amendment rights to protect society through the placement of exculpatory and explanatory notes on the work product; justice requires Respondents be held accountable and responsible for their ex post facto actions, review those illegally prosecuted over the past ten years and through appropriate, monetary compensation, make them whole; or alternatively, that the District Court's judgment be vacated and that the issues be placed before a new judge. "The guiding consideration is that the administration of

justice should reasonably appear to be disinterested as well as be so in fact." Liljeberg, 486 U.S. 847, at 870, quoting Public Utilities Comm'n of D.C. v. Pollack, 343 U.S. 451, 466-467, 72 S.Ct. 813, 822-823, 96 L.Ed. 1068 (1952) (Frankfurter, J., in chambers).

Judge Steele's conduct by retracing the crooked path presented by Respondents has cast a shadow on the case presented before him and recusal is the only remedy to renew the public's faith and assurance in the integrity and fairness of the judicial system while prompting other judges to restore impartiality to the litigants in the judicial process. As the statutory standards have been met, the trial judge should step down and let another judge be assigned who will not unfairly weigh extrajudicial evidence or representations in favor of Respondents.

In conclusion, Petitioner respectfully prays that an order be issued by this Court directed to the Honorable John Steele, directing him to vacate his order dismissing this matter due to lack of standing and directing against Petitioner, reconsideration of an injunction under a new judge since the fear of reprisal is alive, warranted and imminent; Judge Steele must disqualify himself from presiding in this action and to grant all other requested relief as the Court may deem proper.

Finally and in closing, the Petition for a Writ of Certiorari should be granted for the reasons cited above.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

CLINTON W. FINSTAD, Pro Se

Dated: June 5, 2009

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-15768
Non-Argument Calendar

D. C. Docket No. 06-00664-CV-FTM-29-SPC

CLINTON W. FINSTAD,

Plaintiff-Appellant,

versus

STATE OF FLORIDA, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION,
Board of Surveyors & Mappers,
ERIC R. HURST,
Assistant General Counsel,
DENNIS E. BLAKENSHIP,
Professional Land Surveyor,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(October 3, 2008)

Before CARNES, BARKETT and PRYOR, Circuit Judges.

PER CURIAM:

Clinton W. Finstad appeals the dismissal of his *pro se* complaint for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The district court concluded that Finstad's complaint is moot. We affirm.

We review *de novo* the dismissal of a complaint under Rule 12(b)(1). *Asociacion De Empleados Del Area Canalera v. Panama Canal Comm'n,* 329 F.3d 1235, 1237-38 (11th Cir. 2003). We also review *de novo* issues of mootness and subject matter jurisdiction. *DiMaio v. Democratic Nat'l Comm.,* 520 F.3d 1299, 1301 (11th Cir. 2008); *Crown Media, LLC v. Gwinnett County, Ga.,* 380 F.3d 1317, 1323 (11th Cir. 2004).

The jurisdiction of the federal courts is limited to actual cases and controversies. *Crown Media,* 380 F.3d at 1324. A complaint becomes moot when it no longer presents a "live" controversy or a ruling on the issues would have no practical significance. *Id.* "The standing doctrine, like the mootness doctrine, is an aspect of the 'case or controversy' requirement." *Sims v. Fla. Dep't of Highway Safety,* 862 F.2d 1449, 1464 (11th Cir. 1989) (en banc). To establish standing, a plaintiff must satisfy three requirements: an injury in fact, causation, and redressability. *Tanner Adver. Group, L.L.C. v. Fayette County, Ga.,* 451 F.3d 777, 791 (11th Cir. 2006). A plaintiff can maintain a pre-enforcement challenge to a law if he alleges either that "(1) he was threatened with prosecution; (2) prosecution is likely; or (3) there is a credible threat of prosecution." *Am. Civil Liberties Union v. The Fla. Bar,* 999 F.2d 1486, 1492 (11th Cir. 1993).

Finstad's complaint is moot. Finstad, a surveyor, complains that his rights under the First Amendment were violated when the Board of Surveyors charged him with violating a state administrative rule that prohibited disclaimers on surveys, but the administrative complaint was later dismissed by a panel of the Board. *See Burke v. Barnes,* 479 U.S. 361, 363, 107 S. Ct. 734, 736 (1987) (the plaintiff must have a "live" controversy "at the time the federal court decides the case; it is not enough that there may have been a live case or controversy when the case" was filed). Although Finstad argues that the Board dismissed the complaint voluntarily to avoid suit, *see Troiano v. Supervisor of Elections in Palm Beach County, Fla.,* 382 F.3d 1276, 1282-83 (11th Cir. 2004), the panel concluded that the administrative rule does not prohibit the conduct alleged in Finstad's complaint. The panel instead concluded that the current rule permits a surveyor to use "explanatory notes" on a survey. *See Am. Civil Liberties Union,* 999 F.2d at 1492.

Finstad's complaint also does not fall within the exception to the doctrine of mootness for repetitious harms that evade review because nothing in the record suggests that Finstad is likely to face prosecution for violation of the same administrative rule. *See Murphy v. Hunt,* 455 U.S. 478, 482, 102 S. Ct. 1181, 1183 (1982). Although Eric Hurst, Assistant General Counsel of the State Department of Business and Professional Regulation, suggested that the Board would promulgate a rule to prohibit disclaimers,

Hurst's statement is speculative. A complaint about the adoption of that potential rule is not ripe. *Cf. Atlanta Gas Light Co. v. U.S. Dep't of Energy,* 666 F.2d 1359, 1370 (11th Cir. 1982) (pre-enforcement challenge to constitutionality of Section 402 of Fuel Use Act was not ripe when states had not adopted laws to enforce the section).

Finstad's remaining arguments also fail. Finstad asserts that his corporation and other surveyors face prosecution for the use of disclaimers, but he lacks standing to pursue claims on behalf of an entity or another person. *See Wolff v. Cash 4 Titles,* 351 F.3d 1348, 1357 (11th Cir. 2003). Finstad complains, for the first time on appeal, that the state violated his rights under the Fourth, Fifth, and Fourteenth Amendments and the Board acted under an invalid grant of legislative authority, but these arguments are not properly before this Court. *See Access Now, Inc. v. Southwest Airlines Co.,* 385 F.3d 1324, 1331 (11th Cir. 2004).

The dismissal of Finstad's complaint is **AFFIRMED.**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

CLINTON W. FINSTAD,

Plaintiff,

vs.

STATE OF FLORIDA, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION; ERIC R. HURST; DENNIS E. BLAKENSHIP,

Defendants.

Case No.
2:06-cv-664-FtM-29SPC

OPINION AND ORDER

(Filed Nov. 14, 2007)

This matter comes before the Court on defendants' Second Motion to Dismiss Complaint on Mootness (Doc. #23) filed on July 18, 2007. Plaintiff filed a Response (Doc. #25) on July 30, 2007.

I.

The Complaint alleges the following facts: Plaintiff is a registered surveyor in Florida. In 2006, the Florida Department of Business and Professional Regulation (DBPR) initiated an administrative complaint against plaintiff as a result of his use of "explanatory notes" such as "Not for Construction" on

surveys. (Doc. #1, ¶4.) Plaintiff initiated the instant action seeking: (1) a declaration that "explanatory notes" on surveys constitute protected speech under the First Amendment; (2) a declaration that FLA. ADMIN. CODE ANN. r. §§ 61G17-2.001(6)(e)(1) and 61G17-6.0031(1)(a) are unconstitutional; and (3) an injunction preventing defendants from interfering with plaintiff and other similarly situated individuals' rights to utilize "explanatory notes" on surveys. (Doc. #1, pp. 6-8.)

Defendants' Motion to Dismiss asserts that plaintiff no longer has standing to pursue this case. Specifically, defendants argue that while this case has been pending, the Board of Surveyors has dismissed the DBPR's administrative complaint against plaintiff and the prosecuting attorney has stated that the current regulatory regime allows the use of "explanatory notes." (Doc. #23, p. 4.) Thus defendants assert that there is no longer a case or controversy. Plaintiff counters that he continues to have standing in light of defendant's stated intent to promulgate a regulation barring the use of "explanatory notes" on surveys. (Doc. #25, p. 2.) Furthermore, plaintiff argues that defendants have indicated their intent to pursue sanctions against plaintiff's company. (*Id.*)

II.

Mootness and standing are issues of justiciability which are components of a federal court's subject matter jurisdiction analysis, *Fla. Pub. Interest*

Research Group Citizen Lobby, Inc. v. EPA, 386 F.3d 1070, 1082 (11th Cir. 2004) (standing); *Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1278 n.2 (11th Cir. 2004) (mootness). Motions which raise mootness or the lack of standing attack the court's subject matter jurisdiction, and are therefore considered pursuant to Rule 12(b)(1). *Doe v. Pryor*, 344 F.3d 1282, 1284 (11th Cir. 2003). Rule 12(b)(1) motions challenging the subject matter jurisdiction of the court come in two forms, a "facial" attack motion and a "factual" attack motion. *Morrison v. Amway Corp.*, 323 F.3d 920, 924 n.5 (11th Cir. 2003). A facial attack challenges subject matter jurisdiction based on the allegations in the complaint, and the court takes the allegations in the complaint as true in deciding the motion. *Id.* at 924 n.5. The complaint may be dismissed for a facial lack of standing only "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Jackson v. Okaloosa County*, 21 F.3d 1531, 1536 n.5 (11th Cir. 1994) (citation omitted). When a court considers a Rule 12(b)(1) dismissal of a case on a factual challenge to subject matter jurisdiction (either for lack of standing or mootness), the court may consider facts outside the pleadings such as testimony and affidavits as long as the facts necessary to sustain jurisdiction do not implicate the merits of plaintiff's cause of action. *Morrison*, 323 F.3d at 924-25; *Goodman*, 259 F.3d at 1331 n.6

In order to establish standing, a plaintiff must adequately allege and ultimately prove, three

elements: (1) that he or she has suffered an "injury-in-fact;" (2) a causal connection between the asserted injury-in-fact and the challenged conduct of the defendant; and (3) that the injury likely will be redressed by a favorable decision. *Shotz v. Cates*, 256 F.3d 1077, 1081 (11th Cir. 2001) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). These requirements are the "irreducible minimum" required by the Constitution for a plaintiff to proceed in federal court. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000); *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 664 (1993).

In addition, plaintiffs seeking injunctive relief lack standing unless they allege facts giving rise to an inference that they will suffer future discrimination by the defendant. *Shotz*, 256 F.3d at 1081. "[A] party has standing to seek injunctive relief only if the party alleges, and ultimately proves, a real and immediate – as opposed to a merely conjectural or hypothetical – threat of future injury." *Church v. City of Huntsville*, 30 F.3d 1332, 1337 (11th Cir. 1994); *see also Bowen v. First Family Fin. Servs.*, 233 F.3d 1331, 1340 (11th Cir. 2000).

Mootness can occur due to a change in circumstances or a change in law. *Coral Springs St. Sys. v. City of Sunrise*, 371 F.3d 1320 (11th Cir. 2004). A case is also moot when the issue presented is no longer live, the parties lack a legally cognizable interest in its outcome, or a decision could no longer provide meaningful relief to a party. *Troiano* 382 F.3d. at

1281-82; *Christian Coalition v. Cole*, 355 F.3d 1288 (11th Cir. 2004). Dismissal is not discretionary but "is required because mootness is jurisdictional. Any decision on the merits would be an impermissible advisory opinion." *Troiano*, 382 F.3d at 1282 (citing *Najjar v. Ashcroft*, 273 F.3d 1330, 1335-36 (11th Cir. 2001)).

III.

The Court finds that plaintiff lacks standing to pursue this cause of action due to the Board of Surveyors decision to close the administrative complaint, and the representation made by the prosecuting attorney that the current regulatory regime permits the use of "explanatory notes." (Docs. # 23-4; 23-2, pp. 4-5.) Plaintiff's Response (Doc. #25), in effect, asks this Court to rule on a regulation that is being contemplated by the defendants to bar "explanatory notes." (Doc. #25, p. 2.) Such a ruling would be advisory in nature and thus impermissible. *See Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) ("federal court[s] [lacks] the power to render advisory opinions.")

Plaintiff also asserts that an injunction is necessary to prevent any future violation of his First Amendment rights. (Doc. #1, pp. 6-7.) An injunction is limited to prospective relief. *Dombrowski v. Pfister*, 380 U.S. 479, 485 (1965). However, as discussed above, there is no possibility of future injury under the current regulatory regime as "explanatory notes"

have been found to be permissible. Therefore the entry of an injunction is not warranted.

Accordingly, it is now

ORDERED:

1. Defendants' Second Motion to Dismiss Complaint on mootness (Doc. #23) is **GRANTED**.

2. The Clerk is directed to: (1) enter judgment accordingly; (2) terminate any pending motions; and (3) close the case file.

DONE AND ORDERED at Fort Myers, Florida, this 14th day of November, 2007.

/s/ John E. Steele
JOHN E. STEELE
United States District Judge

Copies: Counsel of record

BOARD OF PROFESSIONAL SURVEYORS & MAPPERS

GENERAL BUSINESS MEETING

DEPARTMENT OF BUSINESS
AND PROFESSIONAL
REGULATIONS,

Petitioner,

vs.

JOHN JAY JOHNSON	Case No.: 2007-040027
L & J SURVEY & ENGINEERING	Case No.: 2007-048080
F.L.A. SURVEY CORP.	Case No.: 2005-037384
F.L.A. SURVEY CORP.	Case No.: 2005-056129
GEORGE R. RICHMOND	Case No.: 2005-037365
LELAND F. DYSARD	Case No.: 2005-056049

Respondents.

* *

TRANSCRIPT OF PROCEEDINGS

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DATE TAKEN:	THURSDAY, OCTOBER 2, 2008
TIME:	COMMENCED AT 10:25 A.M. CONCLUDED AT 11:18 A.M.
PLACE:	CASA MONICA HOTEL 95 CORDOVA STREET ST. AUGUSTINE, FLORIDA
REPORTED BY:	MARY GRAYBOSCH, RPR, CRR COURT REPORTER and NOTARY PUBLIC

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[17] What the Department is attempting to do is to jump over that whole concept about ruling. And they're – and those objections were timely filed, and the motions were timely filed.

And the Department did not rule on them in – in a timely manner. And so the probable cause panel heard evidence that was illegally obtained.

Now, that needs to be well settled before it comes before a disciplinary agency –

MS. GUILLEMETTE: Sir –

MR. MADSON: – such as the Board. I'm – I'm – go ahead, Ms. Guillemette.

MS. GUILLEMETTE: I'm saying is that the administrative complaint was entered.

You have that issue past – it is – you can appeal that. And the administrative complaint is entered, and – and we're past the stage where you can argue about probable cause at this point.

You do have other objections, if we can move on.

MR. MADSON: Well, if what you're saying is that my clients' civil rights can be rode – ridden over roughshod –

MS. GUILLEMETTE: You can argue that to the appeals court, sir.

[18] MR. MADSON: That's the Board's vote if that's the way they want to go.

MS. GUILLEMETTE: Well, we're past probable cause. An administrative complaint has been entered. Those were addressed.

Now we have before the Court Respondent's second objection to Petitioner's illegal, improper, coercive and unconstitutional acquisition of certain documents from Respondent.

Let's back up here for a second. We have a motion and a second before the Board to hear the – to not – pardon me.

Yes, to overrule the petition – pardon me – Respondent's objections to the proposed hearing on October 2 to the extent that it would consider the motions.

MR. MADSON: I would make a very short statement.

I do not believe it is ripe for a disciplinary hearing, and I object to any disciplinary action taking place today.

In an abundance of caution, I filed a motion to suppress, which delineates and has affidavits from my clients on each one of these cases.

If it is the Board's pleasure to Move forward [19] and to find that they're – that they're going to act on these cases and ignore my objections and motions, well, then, in the interest of time, we can take all six

cases and – and – and just go one at a time, I mean, and just knock them down.

Sort of like Judge Roy Bean, we'll just give them a fair trial and hang them. That's one of the ways it is.

MS. GUILLEMETTE: And what I believe – and my recommendation to the Board is that they do not proceed to disciplinary portion today, but they only rule on the motions.

MR. MADSON: But you would agree that you're in a disciplinary hearing, wouldn't you?

MS. GUILLEMETTE: Sir, my – my recommendation is that the Board do not proceed to disciplinary hearing today, but only rule on the motions.

And I believe that was what the motion that was made.

MR. BUSH: It's exactly what it was.

MS. GUILLEMETTE: Okay.

MR. COONER: In other words, we're not going there.

MS. SUTPHIN: And –

[20] MR. COONER: We're not going to the discipline phase.

MS. SUTPHIN: And one way –

MR. COONER: We're going to rule on your objections.

MR. BUSH: Our board serves many functions, of one is disciplinary action. And I think hearing this is a separate finding completely, and that's –

MS. SUTPHIN: Can we make real sure that I'm clear on exactly which motion?

MS. GUILLEMETTE: Okay.

MS. SUTPHIN: It's the second – go ahead.

MS. GUILLEMETTE: Okay. What we're ruling – what I have asked the Board to consider first is Respondent's objection to Petitioner's proposed hearing on October 2, 2008.

That was filed on September 24, 2008. That is in your additional packet.

And there's one that was in – it's not in the agenda. It's in your additional packet. I'm asking that that be ruled on first.

And what I – no. And what I'm asking is that – and I think there is a motion and a second out there – that the Board will not proceed to [21] disciplinary hearing, but has – wants to hear the – consider the motions before the Board today.

And I think we have a motion and a second to that.

MR. COONER: We did. Is there any further discussion on the motion?

(No response.)

MR. COONER: Hearing none, all those in favor, aye?

(Thereupon all voting members except Ms. Sutphin responded in the affirmative.)

MR. COONER: Opposed?

MS. SUTPHIN: Nay.

MS. GUILLEMETTE: Okay, The next matter that I think the Board needs to take up is on page 834.

And that's Respondent's second objection to Petitioner's illegal, improper, coercive and unconstitutional acquisition of certain documents from Respondent and demand for dismissal,

Now, I went through this motion step by step. There's a lot of factual allegations.

And, basically, what I've looked at is the legal argument. And there's basically three arguments that are presented by Mr. Madson.

[22] The first is a – basically, a Fourth-Amendment search-and-seizure argument.

There's also a Fifth-Amendment against-self-incrimination argument.

And then there is a argument that talks about double jeopardy, and that's in the context of having one against Mr. Johnson and one against the company that Mr. Johnson owns, but two different licenses.

In any case, I have supplied the board members with the law that goes to each one. And I'd like to have each one of these treated separately.

I would like – I think that, based on the law and based on the facts presented, based on the motion filed by the respondent and the response filed by the petitioner, considering the law presented, I would like the Board to overrule Mr. Madson's objection on Fourth-Amendment search-and-seizure rights.

MR. COONER: That would be your recommendation –

MS. GUILLEMETTE: Yes.

MR. COONER: – to us?

MS. GUILLEMETTE: Uh-huh.

MR. MADSON: Before – before you get a

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[24] MR. COONER: Okay All of these issues, the three – the big three have been addressed in this memorandum. Motion and second. Discussion?

(No response.)

MR. COONER: Hearing none, all those in favor, aye?

(Thereupon all voting members responded in the affirmative.)

MR. COONER: Opposed?

(No response.)

MS. GUILLEMETTE: Second, I would ask that the Board consider the Fifth-Amendment issues, which were – which were addressed and pled by the respondent in that same motion which is on page 834.

This is not a custodial situation. And I – and it's also been addressed in the – in the memorandum I sent.

It's addressed in the respondent's – pardon me – the petitioner's response. And I'd ask that the petitioner's objection as to the Fifth-Amendment right to remain silent be overruled.

MR. BUSH: So moved.

MR. COONER: There is a motion. Is there a [25] second?

MR. MASTRONICOLA: Second.

MR. COONER: Motion and second. Discussion?

MR. MADSON: If I may?

MR. COONER: Yes.

MS. SUTPHIN: We didn't have a second, did we?

MR. COONER: Yes. I think this is the time for the other information.

MR. MADSON: There's no evidence before this Board that the respondent was ever advised of his right to remain silent.

It – it – he was intimidated into giving this information, and then it was used against him.

He was hung by his own rope, and that's – and the Courts are clear about that.

He – the respondent had all the rights of a criminal defendant, and he was not granted those rights. It's that simple.

You're being asked to rule on a – on an issue of law. I'm not sure this is the – the proper venue. In fact, I'm sure it is not the proper venue.

And in respect to Ms. Guillemette, I think [26] this should be ruled on before some Court.

MS. GUILLEMETTE: I'm sure you'll have your opportunity to argue this in front of the First DCA, so – or if you so require, but I think that the facts that you just said were all presented in your motion, and the Board – its properly before the Board. The Board can rule.

MR. MADSON: And it's in the record. Yes, ma'am.

MR. COONER: So you've heard Mr. Madson's legal position. You've heard our attorney's advice, and there is a motion and a second.

Any further discussion?

(No response.)

MR. COONER: Hearing none, all those in favor, aye?

(Thereupon all voting members except Ms. Sutphin responded in the affirmative.)

MR. COONER: Opposed?

MS. SUTPHIN: Nay. And I'm going to –

MR., COONER: Motion carries.

MS. SUTPHIN: Can I make a statement here?

Again, my – my reason for being opposed to these is this is such a complex situation that I don't feel like, when I'm handed this stuff either [27] the day before or the day of our meeting, that it gives me a accurate amount of time to give this the review that it needs to be given.

So that's my primary objection to everything that we're doing.

MR. COONER: I understand.

MS. GUILLEMETTE: All right. The next area that I think the Board needs to look at – and,

again, this is relating to the Respondent's second objection to Petitioner's illegal, improper, coercive and unconstitutional acquisition of certain documents from Respondent and demand for dismissal on page 834 – is the double-jeopardy issue.

Again, the double-jeopardy issue has been argued in the memorandum of law that was supplied by my office.

And it has been addressed in the petitioner's response.

And based on all of that before the Board, I would ask that the Board overrule that objection, as well.

MR. BUSH: So moved.

MR. MASTRONICOLA: Second.

MR. COONER: There's a motion and a second. [28] Discussion?

MR. GREER: One question, Mr. Madson.

MR. COONER: Sid?

MR. GREER: What we are doing here today, is this going to be the same for all the cases?

MR. MADSON: Yes, sir.

MR. GREER: In other words, we're not going to get into different issues for different cases?

MR. MADSON: No, sir.

MR. GREER: Okay. That's fine.

So we can go back – when you go through these cases, we can assume the votes that we've taken are going to be the same for all the cases.

MR. MADSON: In the interest of time, if you rule this way on Mr. Johnson's case, all of the – my other cases have identical arguments, and just names and dates have been changed. And there are affidavits on each of them.

MS. GUILLEMETTE: I would still rather take these cases separately because if they're appealed, it makes it much easier.

MR. GREER: Okay. That's fine.

MS. GUILLEMETTE: Okay. So the double-jeopardy issue, we have a motion and a second.

[29] I don't know if there was a vote.

MR. COONER: No.

Is there any further discussion on the double jeopardy? Again, each of the three issues is addressed in the memorandum.

Any further discussion?

(No response.)

MR. COONER: Hearing none, all those in favor, aye?

(Thereupon all voting members except Ms. Sutphin responded in the affirmative.)

MR. COONER: Opposed?

MS. SUTPHIN: Nay.

MR. COONER: Motion carries.

MS. GUILLEMETTE: Based on those three objections being overruled by the Board, I would ask that the Board deny Mr. Madson's demand for dismissal, which is part of the motion on page 834, Respondent's second objection to Petitioner's illegal, improper, coercive and unconstitutional acquisition of certain documents from Respondent and demand for dismissal.

MR. BUSH: So moved.

MR. MASTRONICOLA: Second.

MR. COONER: Motion and a second. [30] Discussion.

(No response.)

MR. COONER: All those in favor, aye?

(Thereupon all voting members responded in the affirmative.)

MR. COONER: Opposed?

Were you –

MS. SUTPHIN: I'm not going to oppose that one.

MR. COONER: Okay. Motion carries.

MS. GUILLEMETTE: All right. In addition, what was also supplied before the Board today is the motion to suppress evidence.

And that is a new document which Mr. Madson brought with him today.

Again, I think that these issues – we did that.

I think that these issues are basically a rit – reiteration of the ones argued in the previous ones.

And I would ask that the Board, based on its prior rulings overruling the Fourth-Amendment objection, the Fifth-Amendment objection and the double-jeopardy objection, deny the motion to suppress evidence which was presented today.

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[43] coercive and unconstitutional acquisition of certain documents from Respondent.

And that's in your looseleaf folder. And it's similar to the ones that was previous – were previously discussed.

Also, again, the first thing we need to address is Respondent's objection to Plaintiff's proposed hearing of 10/12/2008, and I'd ask the Board – I'd ask that the Board rule that they are not going forward to disciplinary hearings today, but will consider the motions before the Board.

MR. BUSH: So moved.

MR. COONER: There's a motion. Second?

MR. LEBRON: Second.

MR. COONER: Second. Discussion?

(No response.)

MR. COONER: All those in favor, aye?

(Thereupon all voting members except Ms. Sutphin responded in the affirmative.)

MR. COONER: Opposed?

MS. SUTPHIN: Nay.

MR. COONER: Motion carries.

MS. GUILLEMETTE: Okay. Based on the motion filed by the respondent of May 12, 2008, that would be the objections to Plaintiff's improper, [44] coercive or unconstitutional acquisition of certain documents from Respondent, the petition – petitioner's response, which was filed on 9/26/2008, and the memorandum of law supplied by my office, I would ask that this Board overrule Respondent's objections on the basis of fourth, fifth and double jeopardy.

MR. BUSH: So moved.

MR. GREER: Second.

MR. COONER: Motion and second. Discussion?

MR. MADSON: Yes.

MR. COONER: Mr. Madson?

MR. MADSON: Do the pleadings of the 26th, by the Department, reach F.L.A. Surveys?

I noticed that they seem to reach, in paragraph five, Respondent L & J Surveying and Engineering.

MS. GUILLEMETTE: All right. If they do plead in there, you can rely on them.

If not, I'd ask that, on its own motion, the Board rule that Mr. – that the objections – if it's addressed to it, they could rely on it. If not, they know the law and they can rule anyway.

I think we can go ahead and vote on that motion.

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[48] MS. GUILLEMETTE: Well, I think when it was first put before the Board today, what the Department of Business and Professional Regulation had contemplated was that there would be a finding of waiver since there was no election of rights filed.

MR. BUSH: Was there an election of rights filed on the previous case?

MS. DUFFY: No, sir.

MR. BUSH: Why isn't there –

MS. GUILLEMETTE: There was no election of rights filed in any of them.

MR. BUSH: Any of them.

MS. GUILLEMETTE: Instead of that, he filed motions.

And, technically, since there was no waive no election of rights, the Board could consider it for a waiver today.

Rather than do that, what the Department has agreed to do is to just ask the Board to rule on the motions rather than to go to a disciplinary hearing and find a waiver.

MR. BUSH: Okay,

MS. GUILLEMETTE: So we're on the next case, which is 2005-56129.

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[50] double jeopardy?

MS. GUILLEMETTE: Right, but I'm looking for where that – his motion is, I think that was in the packet.

Okay. This is in your packet. It's not in the – your looseleaf packet. It's Respondent's motion to – no. Hold on.

It's the May 12, 2008, filing of Respondent's objections to Plaintiff's improper, coercive and unconstitutional acquisition of certain documents from the respondent, and that's in your looseleaf folder.

I'd ask that the Board deny the objections based on fourth, fifth and double jeopardy, and deny the dismissal of the complaint.

MR. BUSH: So moved.

MR. MASTRONICOLA: Second.

MR. COONER: Motion, second. Is there a discussion?

(No response.)

MR. COONER: Hearing none, all those in favor, aye?

(Thereupon all voting members except Ms. Sutphin responded in the affirmative.)

MS. GUILLEMETTE: As to the motion to

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BOARD OF PROFESSIONAL SURVEYORS &
MAPPERS PROBABLE CAUSE PANEL MEETING

APRIL 8, 2008

Gaylord Palms Resort & Convention Center
6000 West Osceola Parkway
Kissimmee, Florida

CERTIFIED COPY

Reported By:

Diana C. Garcia, Court Reporter
Notary Public, State of Florida

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MS. GUILLEMETTE: Okay. I suggest that because of your relationship and your long-term relationship with Mr. Gilmore, it may be more appropriate for you to recuse yourself on this case.

MR. ECHEZABAL: Okay. But I have one question, though.

MS. GUILLEMETTE: Okay. If you're going to recuse yourself on the case, please do not make any comments about the case.

MR. ECHEZABAL: No. I need to make a comment about the information that I've got in my packet for that case.

MS. GUILLEMETTE: No. You cannot. Your relationship with Mr. Gilmore, I believe, is such that it makes it difficult for you to rule on the case and you can't make any comments on the case if – if your

relationship would make you feel one way or the other.

MR. ECHEZABAL: Even though I feel that the information that I have is not –

MS. GUILLEMETTE: Please don't. Please don't.

MR. ECHEZABAL: Okay.

MS. GUILLEMETTE: You'll be violating your [8] ethical duties –

MR. ECHEZABAL: Okay.

MS. GUILLEMETTE: – Okay, to say anything at this point.

MS. POPPELL: I have a comment to make as far as is it appropriate for us to close this case, but for Mr. Ramsey to come before of us because of the MTS violations that are left that are in here?

MS. GUILLEMETTE: That's for the Probable Cause to decide, whether the –

MS. POPPELL: But we can do that –

MS. GUILLEMETTE: Uh-huh.

MS. POPPELL: – if we want to?

MS. GUILLEMETTE: Yes. You can amend the administrative – you can amend the administrative complaint –

MS. POPPELL: Uh-huh.

MS. GUILLEMETTE: – and, you know, if you want to close some of the counts, that's appropriate. You can – you can do that.

MS. POPPELL: Okay.

MS. GUILLEMETTE: Uh-huh.

MS. POPPELL: That's what I was thinking that I – I see that some of them have been

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[18] would ask to identify himself.

MR. FINSTAD: Clint Finstad.

MR. HURST: Representing F.L.A. Surveys; is that correct?

MR. FINSTAD: Yes.

MR. HURST: Okay. Why don't we go ahead and swear him in.

THE REPORTER: Do you swear or affirm that the testimony you will give here today will be the truth, the whole truth and nothing but the truth?

MR. FINSTAD: I do.

THE REPORTER: Thank you.

MR. HURST: Panel members, as you are aware, we had several cases against this company and the related individual surveyors, and I have been in the process of bringing those back to you to remove the counts relating to the use of disclaimers

or explanatory notes because the Board is instructed that they are not going to prosecute for that as a violation.

So these drafts before you today add no new charges. They simply remove any counts related to the use of disclaimers, and that is true for all four cases before you today.

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[20] wanted to be sure that that –

MR. HURST: I mean, this complaint was originally – this complaint was originally filed in –

MS. POPPELL: '05 or –

MR. HURST: – September of '05.

MS. POPPELL: Okay. Well, I just wanted to be sure that that was quoting it and I wasn't missing something there since you said it's all taken care of.

MR. ECHEZABAL: Can I ask a question of that gentleman?

UNIDENTIFIED SPEAKER: Yes.

MS. GUILLEMETTE: (Unintelligible.)

MR. ECHEZABAL: I beg your pardon?

MS. GUILLEMETTE: Do you know this guy at all?

MR. ECHEZABAL: No, I don't. Well, I know a lot of people, you know, but I –

MS. GUILLEMETTE: Ask him the questions now.

MR. FINSTAD: Ask me.

MR. ECHEZABAL: Can I ask you a question? What good is a survey to the public if I have a boundary survey and they start putting no fence [21] for construction, not for the sign, not for construction, no fence, what good is that survey? What value does it have to the consumer?

MR. FINSTAD: May I answer?

MR. ECHEZABAL: I know that it's part of NTS or whatever. But I'm asking what – what value does it have?

MR. FINSTAD: May I answer complete, please? May I answer completely?

MR. ECHEZABAL: Okay.

MR. FINSTAD: May I answer completely?

MR. ECHEZABAL: Yeah.

MR. FINSTAD: Thank you for the opportunity to speak.

As I said before, my name is Clint Finstad and I'm the president of F.L.A. Surveys. F.L.A. Surveys is one of the respondents.

The facts before you and each of these cases and, since my legal counsel is not present, I cannot present any further evidence in this matter at this time.

Accordingly, since any and all alleged violations against us are rendered moot, by our notes on the subject surveys, I respectfully

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[24] MR. HURST: Thank you.

MR. FINSTAD: Am I excused?

MR. HURST: Yes, sir.

MR. FINSTAD: Thank you very much.

MR. ECHEZABAL: Have a good day.

MR. FINSTAD: Appreciate your time.

MR. ECHEZABAL: Madam Attorney, can I made a comment at this time, or don't?

MS. GUILLEMETTE: You can make a comment. However –

MR. HURST: Let me – let me – let me caution you that we have a pending federal lawsuit that –

MS. GUILLEMETTE: Don't –

MR. HURST: – has been filed by this individual and I would rather not –

MS. GUILLEMETTE: And the other –

MR. HURST: – you comment on the record.

MS. GUILLEMETTE: – thing is he was here for his hearing. He wanted to participate. So to comment on that particular hearing would be inappropriate at this time.

MR. ECHEZABAL: Well, we have other cases that had similar things in them. So –

MR. GUILLEMETTE: Okay. Talk about other [25] cases, but don't talk about these –

MR. ECHEZABAL: Well –

MS. GUILLEMETTE: – because the vote has been done. He was here for his hearing. For you to comment now wouldn't give him an opportunity to respond.

MR. ECHEZABAL: Okay.

MS. GUILLEMETTE: So don't talk about those four cases.

MR. ECHEZABAL: No, I'm not talking about the – I'm talking about the issues that we have, you know, regarding certain matters.

So, again – okay. I'll move on.

MS. GUILLEMETTE: Mr. Echezabal, please move on.

MR. ECHEZABAL: Move on.

MS. GUILLEMETTE: Move on. Don't talk – no comments about those cases.

MR. ECHEZABAL: I'm not – okay.

MS. GUILLEMETTE: Okay.

MR. HURST: We. have one further public case on today's agenda, Item R-1, Ralph D. Denuzzio & Associates, Inc., 2006-057261.

The complaint alleged that subject provided her – complainant alleged that the subject

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